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Search of Premises By Consent

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INTRODUCTION

"Search by consent" is an investigative technique frequently used by law enforcement officers where premises are protected against unreasonable search by the fourth amendment to the Constitution of the United States. Properly made, such searches are deemed reasonable and therefore in full accord with constitutional requirements. The utility of this technique and the subtle distinctions which determine its legality require a familiarity with its basic elements.

The starting point for a good understanding of consent searches is the fact that although the law consistently approves of this technique, when legal prerequisites are satisfied, it does not favor it. The law prefers those searches made by search warrant, for the intervention of a magistrate provides the greatest assurance the officers acted in observance of the rights protected by the fourth amendment. The warrant, lawfully issued only upon a finding of probable cause by the neutral and detached magistrate, describes the premises to be searched, shows when they may be searched, and specifies the things that may be sought. Such limitations are not as obvious in a search by consent, and, as a result, the tendency of the courts is to require the searching officer to present convincing proof that his conduct was reasonable throughout.

Proof of this nature is often difficult to provide because of the scarcity of real evidence and the consequent necessity for primary reliance upon testimonial persuasion. If the officer testifies that he received a valid waiver and the person who allegedly gave the consent denies it, the court must look to all the surrounding facts in evidence to determine the issue. Where the facts are not sufficient to make a reasonably convincing case of consent, the law settles the dispute by incorporating a presumption favoring the defendant.

The reasoning here is clear. A person consenting to a search *waives* his constitutional right to be free from search without a warrant or a lawful arrest to which the search is incidental. Since this right is highly regarded, there is a legal presumption (where the facts of the case leave any reasonable doubt) that the person alleged to have consented, in fact, did *not* consent. As has been said many times, the courts ". . . indulge every reasonable presumption against waiver of fundamental constitutional rights."[1]

Judicial reluctance to credit an alleged waiver of fundamental rights does not call for a pessimistic approach to consent searches. This method of search is upheld frequently where there is inquiry into all the circumstances and an effort to mediate fairly between the interest of society in effective law enforcement and the right of the defendant to his privacy. The presumption against waiver does call, however, for care and understanding in each attempt at search by consent in order to satisfy the requirements of the law. An officer preparing to search under this authority must take four separate steps, each of which is summarized below and discussed at greater length in the material which follows. The four steps and the order in which they should be taken are:

First, determine whether the premises are such that they are protected by the fourth amendment. Some areas, such as open fields and public places, can be searched lawfully without consent, search warrant, or a contemporaneous arrest therein, and any incriminating evidence thus uncovered may be collected and used by the prosecution.

Second, if the premises do enjoy the fourth amendment protection against unreasonable searches, identify the person lawfully entitled to possession at this time. The privacy guaranteed by the amendment is found in the right of possession, not in the legal title to the premises.

Third, obtain from that person a voluntary waiver of the constitutional rights declared in the fourth amendment. The consent should specify the scope and intensity of the contemplated search.

Fourth, conduct the search within the limitations expressed or implied in the consent.

Scope of Fourth Amendment Protection

A. *When Consent to Search is Required*

If the officer has no search warrant and lacks authority to make a lawful arrest to which a search of the premises could be

1. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). For recent decisions applying this rule to consent situations see: Weed v. United States, 340 F.2d 827 (10th Cir. 1965); Wion v. United States, 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); United States v. Page, 302 F.2d 81 (9th Cir. 1962); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

incident, a reasonable search for fruits, instrumentalities, contraband, and specific items of mere evidence requires consent if the place is protected by the fourth amendment. The amendment speaks of "houses," but this word is broadly defined to include any enclosure used as a habitation, as a place of business, or as a place to store personal effects. The protected "houses" include: private dwellings;[2] apartments;[3] hotel rooms;[4] boardinghouse rooms;[5] guest rooms;[6] offices;[7] business buildings;[8] and miscellaneous places.[9]

The right of privacy in premises used as a residence also extends to the curtilage, defined as:

> The enclosed space of ground and buildings imme-

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2. Chapman v. United States, 365 U.S. 610 (1961); United States v. Mitchell, 322 U.S. 65 (1944), *reh. denied*, 322 U.S. 770 (1944); Amos v. United States, 255 U.S. 313 (1921); United States v. Hall, 348 F.2d 837 (2d Cir. 1965), *cert. denied*, 382 U.S. 947 (1965). Outbuildings located within the curtilage enjoy the protection extended to the dwelling. United States v. Sims, 202 F. Supp. 65 (E.D. Tenn. 1962).

3. Nelson v. People, 346 F.2d 73 (9th Cir. 1965), *cert. denied*, 382 U.S. 964 (1965); Walker v. Pepersack, 316 F.2d 119 (4th Cir. 1963); Channel v. United States, 285 F.2d 217 (9th Cir. 1960).

4. Hoffa v. United States, 385 U.S. 293 (1966), *reh. denied*, 386 U.S. 951 (1967); Stoner v. California, 376 U.S. 483 (1964); United States v. Jeffers, 342 U.S. 48 (1951); Abel v. United States, 362 U.S. 217 (1960); Johnson v. United States, 333 U.S. 10 (1948); Marullo v. United States, 328 F.2d 361 (5th Cir. 1964), *cert. denied*, 379 U.S. 850 (1964) (motel room); Hall v. Warden, 313 F.2d 483 (4th Cir. 1963), *cert. denied*, 374 U.S. 809 (1963).

5. McDonald v. United States, 335 U.S. 451 (1948); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966); Haas v. United States, 344 F.2d 56 (8th Cir. 1965); United States v. Feguer, 302 F.2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962).

6. Jones v. United States, 362 U.S. 257 (1960); Burge v. United States, 342 F.2d 408 (9th Cir. 1965), *cert. denied*, 382 U.S. 829 (1965); Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958), *cert. denied*, 357 U.S. 930 (1958). Also see later discussion under "Guests."

7. Burnham v. United States, 297 F.2d 523 (1st Cir. 1961) (combined place of business and home); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951); United States v. Zarra, 258 F. Supp. 713 (M.D. Pa. 1966); United States v. Guerrina, 112 F. Supp. 126 (E.D. Pa. 1953); United States v. Lagow, 66 F. Supp. 738 (S.D.N.Y. 1946), *aff'd*, 159 F.2d 245 (2d Cir. 1946), *cert. denied*, 331 U.S. 858 (1946), *reh. denied*, 332 U.S. 785 (1947).

8. Amos v. United States, 255 U.S. 313 (1921) (store); Beszutek v. United States, 147 F.2d 142 (2d Cir. 1945); *In re* 14 East Seventeenth Street, 65 F.2d 289 (2d Cir. 1933); United States v. Maryland Baking Co., 81 F. Supp. 560 (N.D. Ga. 1948).

9. Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1965) (house trailer); United States v. Smith, 308 F.2d 657 (2d Cir. 1962), *cert. denied* 372 U.S. 906 (1963) (suitcase stored on premises of another); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955) (locked storage cabinet); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (desk used by employee); Strong v. United States, 46 F.2d 257 (1st Cir. 1931), *cert. granted*, 283 U.S. 815 (1930), *case dismissed*, 284 U.S. 691 (1931) (barn).

diately surrounding a dwelling house . . . a space, necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by fence.[10]

As a general rule, the curtilage should be defined liberally, giving a maximum of protection to the householder, and in the absence of any other authority, a waiver of fourth amendment rights therein (voluntary consent) should be obtained before commencing a search of this property.

The privacy of surroundings, accepted as an integral part of the use and enjoyment of the home, is not as significant a factor where the premises are to be occupied only temporarily,[11] or for nonresidential purposes.[12] These rules seem open to question, however, in any situation where the tenancy is for residential purposes and for an extended time, or the business premises are fenced or otherwise enclosed in any manner indicating an intention to bar all unauthorized access.

B. *Consent Not Required*

The protections of the fourth amendment have not been extended to those areas of private property beyond the curtilage described as "open fields"; therefore, consent to search such places is unnecessary as there are no constitutional rights to be waived.[13] This is an important concept because, under the open fields doctrine, officers acting within the scope of their authority are not prohibited from trespassing on such areas. Any information or real evidence they can acquire in this manner may be used to justify the issuance of a search warrant for the protected portion of the premises or to justify an arrest. It may also be used as direct evidence in a prosecution.

The most obvious application of the open fields doctrine occurs where officers enter farmland, woods, or pastures related to a rural dwelling. Though it is a technical trespass, the officers' presence is not constitutionally prohibited, even where such areas are surrounded by a boundary fence.[14]

Other places not protected under the fourth amendment and which may be searched without obtaining consent are: unoccupied

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10. BLACK'S LAW DICTIONARY 460 (4th ed. 1957).

11. Marullo v. United States, 328 F.2d 361 (5th Cir. 1964), *cert. denied,* 379 U.S. 850 (1964) (motel room used by transients has no curtilage).

12. Giacona v. United States, 257 F.2d 450 (5th Cir. 1958), *cert. denied,* 358 U.S. 873 (1958) (business premises have no curtilage).

13. Hester v. United States, 256 U.S. 57, 59 (1924).

14. United States v. Sims, 202 F. Supp. 65 (E.D. Tenn. 1962). *See, also,* United States v. Young, 322 F.2d 443 (4th Cir. 1963), *cert. denied,* 375 U.S. 962 (1963); United States v. Benson, 299 F.2d 45 (6th Cir. 1962); Janney v. United States, 206 F.2d 601 (4th Cir. 1953); Martin v. United States, 155 F.2d 503 (5th Cir. 1946).

buildings;[15] abandoned dwellings;[16] and fields used for a commercial enterprise, such as an open air nursery for plants and shrubs.[17]

WHO IS LAWFULLY IN POSSESSION OF THE PREMISES

When the officer in charge of the search learns that the premises are of a type protected by the fourth amendment, his next step is to determine who is in lawful possession at this time. Note that the key word here is "possession," not ownership. The fourth amendment is not concerned with legal title to the premises; what it guarantees is the right to possess one's home, office, or other protected place free from unreasonable invasion by the government.[18] The amendment does not provide absolute protection against all searches but clearly prohibits only those stamped "unreasonable." When the need to search for the fruits, instrumentalities, contraband, or evidence of crime is compelling, a reasonable search may be conducted provided only that the officers do not act arbitrarily. They must submit their claims of probable cause to a magistrate for testing, and, if found sufficient, a search of even the most secluded premises may ensue. Though these constitutional rights generated by the fourth amendment are personal and must be claimed individually, the warrant directing an invasion of protected premises is not at all concerned with persons. The command is to ". . . search forthwith the place named for the property specified. . . ." It is not necessary for any person, other than the officer, known or unknown, present or otherwise, to be involved in order for the search to be reasonable. The search is literally directed against certain premises reasonably believed to contain items offensive to the law. In some cases, stolen goods may be recovered from their hiding place in protected premises through the medium of a reasonable search, and yet the identity of the thief as well as that of the occupant of the premises may remain completely unknown.

The law has not interpreted the fourth amendment warrant requirement as being the only touchstone of reasonableness in searching protected premises. Officers lawfully in a dwelling incidental to a bona fide arrest therein have authority to conduct

15. United States v. Romano, 330 F.2d 566 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965), *reh. denied*, 381 U.S. 921 (1965).
16. United States v. Thomas, 216 F. Supp. 942 (N.D. Calif. 1963).
17. United States v. Sorce, 325 F.2d 84 (7th Cir. 1963), *cert. denied*, 376 U.S. 931 (1964).
18. Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257 (1960); Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926), *cert. denied*, 273 U.S. 768 (1926).

a reasonable search of the home (without a search warrant) to uncover known fruits, instrumentalities, or evidence of the crime charged. Their search authority is coextensive with the possession or control exercised in the premises by the arrestee. This reasonable search is not made any less so because the arrestee shares the possessory right with his spouse, business partner, or other joint occupant. Evidence discovered during the course of searching the appropriately delimited area may be collected and is admissible against anyone whom it may incriminate. Such a search may well become unreasonable to the extent that the officers press their examination of the premises beyond those areas clearly in possession of the arrestee or which he occupies jointly, but, when restrained to the areas so possessed or controlled, it is consistent with the requirements of the fourth amendment.

Moreover, the law recognizes as reasonable those searches made with the consent of one having possession of the specific place against which a search is directed. Consent is the pass by which the tollgates of fourth amendment restrictions are traversed. It puts the officers lawfully on the premises and permits their search, limited only by the bounds expressed in the consent and by the physical extent of the area in present possession. Once again, the fact that possession is held jointly is not fatal to the reasonableness of the search, for in reality the one expressing consent does not assume to speak as the alter ego of his cotenant. He speaks for himself as one in possession. His invitation to the officers lawfully commits the premises to their inspection, and, as this is deemed a reasonable search for fourth amendment purposes, the results are admissible in evidence not only against the consenting party himself but also against the contenant and anyone else.

The word "possession," in the fourth amendment sense, means not actual physical occupancy but the legal right to occupy or possess at this moment—the right to exclude others. Mere lawful presence is not enough to establish a possessory interest, and officers may not rely on the "apparent authority" of someone found within to make the consent search reasonable. The test imposed is whether consent was given by one having actual authority.[19]

A person remains in legal possession of his premises even while temporarily residing elsewhere or absent because of business or vacation travel.[20] If the premises are to be searched by consent during this interim, the authorization must be obtained from some other person who exercises possessory authority as an agent for the

19. Stoner v. California, 376 U.S. 483 (1964); Cipres v. United States, 343 F.2d 95, 98 (9th Cir. 1965); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966).

20. Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948); United States v. Brougher, 19 F.R.D. 79 (1956); United States v. Novero, 58 F. Supp. 275 (E.D. Mo. 1944).

owner or who has equal possessory rights.[21]

The problem of determining who has the possessory right to the premises to be searched is not complex in all cases. For example, if the accused is the only tenant of a hotel room, that room is the place to be searched, and he is in the room when the officers arrive, the problem is easily resolved. The accused is the person entitled to possession, and he is there. His consent, and his only, will permit a lawful search. But the relationship of human beings to specific premises, and to each other, are subject to so many variations that officers frequently encounter situations of far greater difficulty. To obtain effective consent to search, the officer must determine "who" can legally consent to "what." This can best be understood by examining each of several relationships which the accused (the person most likely to be incriminated by the evidence sought) may have to protected premises and personal property therein, that is, what he legally possesses and what he does not.

Possessory Interests in Particular

A. *Owner*

If the owner of the house, office, or other protected premises to be searched enjoys the current right to possession and he is physically present, his consent must be obtained. This rule applies whether the search is to be made of the entire premises or of specific suitcases, boxes, or other personal property located therein. It is the fact of his possession which triggers the fourth amendment protections and his physical presence which makes it mandatory for any waiver of his constitutional rights to come directly from him.

A valid consent to search given by the owner-possessor-occupant is effective against himself and any third person who has no possessory right in the premises. Evidence collected during the course of such a search may be used against the third party as well as the person giving consent because the exclusionary rule is inoperative where either there was no fourth amendment right at the time of search or such rights as existed at that time were effectively waived.

If the owner-possessor is *not* physically present when a search is desired, authorization may be obtained from any other person

21. See later discussions of "Partner," "Husband and Wife," "Agent," and "Joint Tenants and Common Occupants."

having the requisite capacity to permit a search of the protected premises. In some cases this may be a partner, spouse, agent or joint occupant.

Where the owner of the premises to be searched is not entitled to immediate possession, he cannot give a consent valid against all other persons. He can, of course, waive whatever interest he has remaining in the premises, but, lacking the current right of possession, his consent is not effective against one who does have such right. A common example is that of the house, apartment, hotel room, office, or business building which the owner has rented to a tenant. Some officers, in cases in which the tenant was the accused, have made the mistake of searching the premises by consent of the owner during a temporary absence of the tenant. Searches of this kind are unreasonable.[22] The owner is not the one in possession and his consent is not valid against the current tenant. His right, as landlord, to enter the premises to inspect for misuse, or to do housekeeping or other maintenance work, does not extend so far as to allow him to authorize officers to search the tenant's home for their purposes.

Occasionally the owner of premises will lease them to a tenant except for some part, such as a bedroom in which he lives or a room for storing his property. The owner possesses that reserved room, and in his capacity as the lawful possessor he can consent to a search of it. Evidence found in that room can be used against the owner, or against any third person having no possessory right therein, such as the tenant of the remainder of the premises.

The owner may consent where the present exclusive possessory interest of his tenant is terminated and he regains the right to immediate possession. For example, if a tenant has abandoned the premises, the owner or landlord may repossess and thereby acquire the legal capacity to consent.[23] This rule applies even where abandonment occurs prior to the time the rental period is up.[24] Similarly, the landlord may give consent to search following termination of the tenant's right to possession where there is formal eviction for nonpayment of rent;[25] or, where the landlord termi-

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22. Stoner v. California, 376 U.S. 483 (1964), *reh. denied,* 377 U.S. 940 (1964) (hotel room); Chapman v. United States, 365 U.S. 610 (1961) (house); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied,* 383 U.S. 968 (1966) (rented room in private home); United States v. Burke, 215 F. Supp. 508 (D. Mass. 1963), *aff'd,* 328 F.2d 399 (1st Cir. 1964), *cert. denied,* 379 U.S. 849 (1964), *reh. denied,* 380 U.S. 927 (1965) (rented room in rooming house).

23. Abel v. United States, 362 U.S. 217 (1960), *reh. denied,* 362 U.S. 984 (1960), Frank v. United States, 347 F.2d 486 (D.C. Cir. 1965), *cert. dismissed,* 382 U.S. 923 (1965).

24. Feguer v. United States, 302 F.2d 214 (8th Cir. 1962), *cert. denied,* 371 U.S. 872 (1962).

25. Paroutian v. United States, 319 F.2d 661 (2d Cir. 1963), *cert. denied,* 375 U.S. 981 (1964).

nates a tenancy-at-will;[26] or otherwise asserts his right to regain possession.[27] But the right to possession remains in the tenant, even though the rent is unpaid, where there is an agreement to that effect,[28] or where the landlord has not yet repossessed the premises.[29] The "landlord-tenant" relationship is no bar to a search by voluntary consent of the landlord where the premises are being used by both in a conspiracy to violate the law. The law will look to the real relationship of the parties and where, as a part of a conspiracy, both have a current right to possession, either may give a vivid consent to search good against the other.[30]

The owner or other occupant having the current right to possession of the premises has the capacity to consent to a search for the purpose of locating and removing property stored on his premises by a trespasser. Perhaps the best example of such a situation is found in *Cutting v. United States*,[31] where information was received that an electric range stolen from the Government was stored in a small building located immediately to the rear of a private house. The owner gave voluntary consent, and it was held that the range, found during the course of the authorized search, was good evidence against a third party accused of the crime.[32]

B. *Tenant*

"Tenant" is broadly defined to include one who, by express or implied agreement, acquires possession but not ownership of a ranch, farm, business building, office, house, apartment, room or other place regardless of the duration of the contract. As long as the occupant has the sole right to possess the premises, whether it be by mutual agreement or simply until the owner orders him to leave, he, and he alone has the legal capacity to consent to a search of those premises that would be good against himself. If he consents, any evidence of crime uncovered can be used against him

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26. United States v. Fause, 242 F. Supp. 574 (D. Mass. 1965).
27. United States v. Cudia, 346 F.2d 227 (7th Cir. 1965), *cert. denied*, 382 U.S. 955 (1965), *reh. denied*, 382 U.S. 1021 (1965).
28. United States v. Olsen, 245 F. Supp. 641 (D. Mont. 1965).
29. Smith v. United States, 243 F. Supp. 222 (D. Ariz. 1965); Chapman v. United States, 365 U.S. 610 (1961).
30. Drummond v. United States, 350 F.2d 983 (9th Cir. 1965), *cert. denied sub nom.* Castaldi v. United States, 384 U.S. 944. Compare United States v. Botsch, 364 F.2d 542 (2d Cir. 1966); United States v. Cudia, 346 F.2d 227 (7th Cir. 1965), *cert. denied*, 382 U.S. 955 (1965), *reh. denied*, 382 U.S. 1021 (1965).
31. Cutting v. United States, 169 F.2d 951 (9th Cir. 1948).
32. *See also*, Von Eichelberger v. United States, 252 F.2d 184 (9th Cir. 1958); United States v. Rees, 193 F. Supp. 849 (D. Md. 1961). *Compare* Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955).

and against any other person having no immediate possessory right to the leased premises or the things found therein.

If the tenant is not physically present or is otherwise unavailable, a consent search directed against his premises cannot be made unless the officers are able to obtain consent from someone else lawfully exercising the possessory right in the premises. Here, the owner is *not* authorized to consent. He surrendered his right of possession when he agreed to the tenancy and retained no implied authority to waive the tenant's constitutional rights.[33]

The tenant of an office building, apartment house, or rooming house may sublease parts of the premises, in which case the subtenant assumes lawful possession of the portion leased solely to him and only he can consent to a search of that area.

Close questions can arise as to the precise limits of the space in lawful possession of the tenant. The general rule appears to be that the tenant possesses only that part specifically described in the lease or commonly understood from the circumstances to be reserved for his exclusive use, for example, the interior of the office, apartment, or hotel room bearing a certain number. Other parts of the building used for the landlord's purposes alone and those used by everyone in common (elevators, stairs, and hallways), and not leased specifically to any tenant, remain in the possession of the owner and can be searched on his consent.[34] Note, however, that by lease or other understanding the tenant may be allowed to store his personal things in a basement locker or a cupboard standing in a public hallway. In this event the tenant also possesses that specific place.[35]

The tenant, like the owner or landlord,[36] must exercise his possessory interest in order to enjoy the fourth amendment protection. Should he give the premises over to the use of another, he, not being in possession even though he pays the rent, is not protected.[37]

C. *Joint Tenants and Common Occupants*

There are relatively few decisions on the search problem where two or more persons (not husband and wife) jointly and equally occupy a house, apartment, hotel room, or other premises and one or more of them become suspects in a criminal investigation. The law allows a search of the parts mutually possessed, effective

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33. See later discussion of "Joint Occupants," "Partners," "Spouses," and "Agents."

34. McDonald v. United States, 335 U.S. 451 (1948); Marullo v. United States, 328 F.2d 361 (5th Cir. 1964), *reh. denied*, 330 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 850 (1964).

35. Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); United States v. Lumia, 36 F. Supp. 552 (W.D.N.Y. 1941).

36. Thomas v. United States, 154 F.2d 365 (10th Cir. 1946).

37. Curry v. United States, 192 F.2d 571 (5th Cir. 1951).

against all of the occupants, on consent given by one of them: "One having equal authority over premises may authorize a search of them."[38] Such a search was upheld in *Nelson v. California*,[39] where police officers were admitted to an apartment by a woman living there with the appellant. She gave the officers consent to search the premises, and in a cupboard they found evidence used against the appellant at trial.[40]

In view of the dearth of authority, it must be assumed that consent given by one common occupant is *not* effective against another who is on the premises at the time and objects to the search.[41] Officers also should make sure that in searching on the consent of one, in the absence of the others, they search only those parts of the premises which he possesses independently and those which he occupies in common. Areas reserved for exclusive use by any or all of the others remain fully protected by the fourth amendment. For example, if the premises contain two bedrooms and one bath, with *A* and *B* occupying bedroom 1 only, and *C* and *D* occupying bedroom 2 only, the consent of *A* to search the entire premises is effective against *A* as to both bedrooms and the bath. He has waived all rights against search. It is effective against *B* as to bedroom 1, which he jointly occupies with *A*, and the bath. It is effective against *C* and *D* as to the bath, which is jointly occupied, but not as to their bedroom, which they do not share with *A*. Further, the consent of *A* alone, the others being absent, does not allow a search of purely personal belongings (trunks, boxes, suitcases, etc.) of *B, C,* and *D* or of any separate closet, dresser drawer or other privately occupied part of the premises.[42]

The problem involved in cases of joint tenants and common occupants is similar to that found in some other situations.[43]

D. *Partner*

The general rule on partnership situations is that a valid con-

38. Drummond v. United States, 350 F.2d 983 (8th Cir. 1965), *cert. denied sub nom.*, Castaldi v. United States, 384 U.S. 964 (1966).

39. Nelson v. California, 346 F.2d 73 (9th Cir. 1965), *cert. denied,* 382 U.S. 964 (1965).

40. *See also* Teasley v. United States, 292 F.2d 460 (9th Cir. 1961) (as to entry only); United States v. Sferas, 210 F.2d 69 (7th Cir. 1953), *cert. denied sub nom.*, Skally v. United States, 347 U.S. 935 (1954).

41. *See* Lucero v. Donovan, 354 F.2d 116 (9th Cir. 1965); Tompkins v. Superior Court, 27 Cal. Rptr. 889, 378 P.2d 113 (1963).

42. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

43. See the discussion under "Partners," "Spouses," and "Guests."

sent obtained from one partner allows a search of the jointly occupied premises that is effective against all the members. "The rule seems to be well established that where two persons have equal rights to the use or occupation of premises, either may give consent to search, and the evidence thus disclosed can be used against either."[44] This rule applies to a search of partnership financial records as well as to partnership premises,[45] and it assumes that consent is received from a full partner. Consent obtained from a silent partner, one who contributes money but has no right to occupy the premises or participate in management of the enterprise, would likely be held ineffective against the other partners.

Even in the case of consent received from a full partner, the search should be limited to those premises and that property which the partners clearly possess in common. If the several partners have separate desks and offices assigned to them individually, consent of one partner only probably does not authorize search of the desks and offices given over to the personal possession of the others.

The consent search problem in partnership situations is similar to that found in cases involving "Husband and Wife" and "Joint Tenants and Common Occupants."[46]

E. *Husband and Wife*

Though, as indicated previously, there is general agreement that persons in joint possession may independently consent to a search of their mutual premises that is valid not only as to themselves but also as to each other, there has been some confusion in the law when this principle was confronted by the case of a husband and wife. The unexpressed difficulty which the early courts appear to have recognized was the fact that married women did not enjoy the same rights as men. It was clear that at least insofar as the right to possess the premises was concerned a married woman was living in her *husband's* house. Therefore, as the courts indicated in cases such as *Humes v. Taber*,[47] even though the wife told the officers to "search to your hearts' content" for evidence that would incriminate her husband, she had no implied authority "to license a search of *his* house for stolen goods."[48]

The emancipation of women and their continuing demands for equality in our society have had their effect, and in most jurisdictions the law's reaction to this increased authority and responsibility is to recognize the right of the wife to share in possession

44. United States v. Sferas, 210 F.2d 69, 74 (7th Cir. 1953).
45. United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961).
46. See the discussion and cases cited under those headings.
47. Humes v. Taber, 1 R.I. 464 (1850).
48. *Id.* at 472.

and control of the mutually enjoyed property. Still, such deep-rooted notions do not easily vanish. A case reported in 1951 announced that a wife could not waive her spouse's immunity from an unlawful search and seizure in her *husband's* home.[49]

Another infirmity of searches authorized by consent of the wife is the tradition of diligently safeguarding the rights of women and others believed to be in need of special protection against coercion or undue influence. In this regard, the courts have been alert to detect any indication that the consent allegedly obtained from the wife was involuntarily given. The balance of those reported cases which have refused to accept evidence obtained during a search authorized only by the alleged consent of the wife has been decided on a finding that in fact or in law she gave no voluntary consent. The leading case in this group is *Amos v. United States*,[50] the only decision so far in which the Supreme Court has considered the interspousal consent question. It was disposed of on the grounds that the wife's consent was the product of coercion and therefore ineffective to waive fourth amendment protections. The Court gave no indication that it would deny the right of a wife to permit a search of premises she possessed jointly with her husband.[51]

While it is incorrect to say that marriage confers authority to waive the constitutional rights of one's spouse, it is equally improper to assume that the marital status deprives a spouse of the right to permit a search of the premises solely or jointly possessed.

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49. Simmons v. State, 94 Okla. Crim. Repts. 18, 229 P.2d 615 (1951).
50. Amos v. United States, 225 U.S. 313 (1921).
51. For other cases in this category see: Foster v. United States, 281 F.2d 310 (8th Cir. 1960) (consent by wife, manager of tavern, to search back room, but evidence insufficient to establish conclusively a waiver, citing *Amos*); Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955) (citing *Amos*); Cofer v. United States, 37 F.2d 677 (5th Cir. 1930) (property surrendered in response to a search warrant and not voluntarily); United States v. Rykowski, 267 F. 866 (S.D. Ohio 1920) (officers read search warrant [invalid] to wife and she merely acquiesced); State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963) (search by search warrant a 3 P.M. found nothing; officers returned at 7 P.M., told wife they were going to "renew" the search, and they were admitted without further protest); Sheftall v. Zipperer, 66 S.E. 253 (Ga. 1909) (no consent); Manning v. Commonwealth, 328 S.W.2d 421 (Ky. 1959) (officer went to subject's home, demanded of the wife the location of clothing worn during the murder, and said ". . . if you don't tell me I'll hold you both as accessories to murder. . . ."); Maupin v. State, 38 Okla. Crim. Repts. 241, 260 P. 92 (1927) (officers acting under invalid search warrant advised wife they wanted to search the premises and she said, "Go ahead."); Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963) (following arrest of husband, officers told wife falsely he had admitted crime and sent them for the "stuff" [loot]).

For example, in *State v. Cairo*,[52] the wife permitted a search of the cellar of a house and store owned jointly and the results were binding on her husband because she was not acting as an agent for him but in her own right. The court said if she had not been related to her husband no question of her right would arise. "In our opinion her mere relationship to one defendant as his wife would not as a matter of law destroy that right which was personal to her."[53]

In all of the reported cases which refused to accept evidence collected under the authority of a spouse's consent, not one was found which held that a spouse in joint possession and who gave truly voluntary consent could not authorize a search that would be binding on the other spouse.

A few cases refuse to recognize the authority of the wife's consent when personal effects in the sole possession of the husband were involved. This is entirely consistent with the theory that the wife's right to permit a search comes from her right to joint possession of the place or thing to be searched and not from the marital relation per se. For example, in *Dalton v. State*,[54] officers investigating a hit-and-run offense asked the wife for consent to search the suspect automobile, which was registered in her name. The car, however, was paid for by the husband, who had sole control and possession of it. The wife had never driven a car. In view of her lack of possession, the court held that the wife could not consent to a search of the car which was her husband's personal "effect," protected by the fourth amendment. Similarly, in *State v. Evans*,[55] a husband's cuff link case in a bedroom dresser drawer was held to be in possession of the husband alone, and his wife could not authorize a search of it. However, even though the item searched and seized is a personal effect of the husband, the wife may consent where she has acquired lawful possession, such as luggage used on a trip,[56] or property left unprotected in an area which she jointly possesses.[57]

The importance of the current right to possession of the specific place to be searched is clearly illustrated in the one case in which the husband's consent was held to be ineffective against the wife. The husband signed an agreement to permit a consent search of his residence at any time as a condition of his release on probation. The house that was searched was in the sole possession of the wife. She was paying for it and operating it as a boardinghouse.

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52. State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948).
53. *Id.* at 847.
54. Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952).
55. State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962).
56. United States v. Walker, 190 F.2d 481 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951).
57. United States v. Roberts, 332 F.2d 892 (8th Cir. 1965), *cert. denied*, 380 U.S. 980 (1965).

The husband was present very seldom and in fact was living elsewhere at the time of the search because his wife had instituted divorce proceedings. The court held the search could not have been authorized by the husband under the conditions prescribed.[58]

There are numerous cases which provide support for the proposition that either spouse may authorize a valid search as long as he or she enjoys the right to joint possession of the place or thing to be searched and effectively consents.[59]

It has not been considered necessary for the officers to determine whether the premises are owned or rented in the name of

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58. People v. Weaver, 241 Mich. 616, 217 N.W. 797 (1928).

59 For a survey of the decisions applying this principle see: Nelson v. People, 346 F.2d 73 (9th Cir. 1965) (consent by commonlaw wife); United States v. Ball, 344 F.2d 925 (6th Cir. 1965); United States v. Roberts, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); United States v. Walker, 190 F.2d 481 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951); Stein v. United States, 166 F.2d 851 (9th Cir. 1948), *cert. denied*, 334 U.S. 844 (1948); United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945) (wife's consent authorized search of main family dwelling and vacant second house on the premises); United States v. Heine, 149 F.2d 485 (2d Cir. 1945), *cert. denied*, 325 U.S. 885 (1945); Driskill v. United States, 281 F. 146 (9th Cir. 1922) (wife consented to search of family garage); United States v. Best, 76 F. Supp. 857 (D. Mass. 1948), *aff'd*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1950), *reh. denied*, 341 U.S. 907 (1950); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957) (in upholding the wife's consent in a murder case the court said where ". . . the property seized is of a kind over which the wife normally exercises as much control as the husband, it is reasonable to conclude that she is in a position to consent to a search and seizure of property in their home."); People v. Dominguez, 144 Cal. App. 2d 63, 300 P.2d 194 (1956); Baugus v. State, 141 So. 2d 264 (Florida 1962) (mistress consented to search of their hotel room); People v. Palmer, 31 Ill. 2d 58, 198 N.E.2d 839 (1964); People v. Perroni, 14 Ill. 2d 581, 153 N.E.2d 578 (1958) (wife consented to search of family house trailer); People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954); State v. Shepard, 255 Iowa 1218, 124 N.W.2d 712 (1964) (husband's consent to search rented apartment valid against wife in search for murdered newborn infant); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964) (wife's consent authorized search under tread of stairway to second floor in home); State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965) (wife's consent to search family cars parked in yard upheld); Jones v. State, 83 Okla. Crim. 358, 177 P.2d 148 (1946) (husband's consent to search of home for evidence against wife authorized search of cookie jar on shelf in a closet); Smith v. McDuffee, 72 Ore. 276, 142 P.2d 558 (1914); Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957); Padilla v. State, 160 Tex. Crim. 618, 273 S.W.2d 889 (1954); Cass v. State, 124 Tex. Crim. 208, 61 S.W.2d 500 (1933) (wife's consent to search home upheld, the court adding that there was no question of a waiver of the husband's constitutional right, instead, the question was whether the consent of the wife made the search reasonable); Bannister v. State, 112 Tex. Crim. 552, 15 S.W.2d 629 (1929) (invalid, crippled husband consented to search of family home for illegal liquor; evidence admissible to charge wife with possession for purpose of sale).

one spouse or both. As pointed out earlier,[60] the right protected by the fourth amendment concerns the privacy enjoyed by the possessor and today it is beyond dispute that in the usual marriage situation the spouses equally possess their residence in general. Search on consent of one spouse only should not go beyond those premises and things which the spouses possess in common or which are possessed in particular by the consenting spouse.

Though the case law is not sufficiently developed to describe a broad general rule, it appears that consent of one spouse alone should not be relied upon to authorize forcible entry and search over the objections of the other spouse who is present on the premises at the time.[61]

In cases where one spouse is a business agent or partner of the other, the authority of the former is controlled by the rules for "Agent" or "Partner," discussed elsewhere.[62] But no agency or partnership authority to consent to search can be implied from the marital relationship alone.[63] For example, where one part of the family dwelling was reserved for the conduct of the husband's business, the wife's consent to search of that part was not effective against her husband.[64]

The consent search problem in cases involving spouses is similar to that in cases of "Partner" and "Joint Tenants and Common Occupants."[65]

F. *Parent and Child*

There is considerable authority for the view that a parent may give consent to search, effective against his child, for a bedroom or other part of the parent's premises occupied by the dependent child. That such a search is reasonable in the law is illustrated by the case of a 21-year-old son who shared a bedroom with two brothers in the home of their parents. After the son was arrested for rape, an officer went to the home, told the mother of the charge, and said he wanted to obtain the coat worn by the son at the time of the alleged crime. The mother led the officer to the son's bedroom closet and allowed him to take the specified clothing. The search was upheld.[66]

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60. See p. 46 *supra*.
61. For a discussion of this problem in the context of a common occupant (not husband-wife) case, see Tompkins v. Superior Court, 59 Cal. 2d 65, 378 P.2d 113 (1963).
62. See p. 55 *supra* and 62 *infra*.
63. United States v. Derman, 66 F. Supp. 511 (S.D.N.Y. 1946).
64. United States v. Rykowski, 267 F. 866 (S.D. Ohio 1920).
65. See p. 54 *supra*.
66. Maxwell v. Stephens, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965), *reh. denied*, 382 U.S. 1000 (1965); *see, also*, Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965); United States *ex rel.* McKenna v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964), *aff'd*, 342 F.2d 998 (3d Cir. 1965), *cert. denied*, 382 U.S. 857 (1965); United

What may be a good statement of the general rule appears in *State v. Kinderman*, a state case where the court said, in part:

> We can agree that the father's 'house' may also be that of the child, but if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of children who live in his house. We cannot agree that a child, whether he be dependent or emancipated (defendant was 22 years of age at the time of his arrest), has the same constitutional rights of privacy in the family home which he might have in a rented hotel room.[67]

As in *Kinderman*, the federal cases have thus far failed to draw a distinction on the age of the child. A child who has been emancipated, whether by reaching the age of 21 or otherwise (as by marriage), and who pays a regular rental for his room in the usual commercial manner, should be considered a tenant in possession of the room.[68]

Cases which appear to be decided contrary to the general rule generally fall into either of two categories: no consent was actually obtained from the parent due to coercion or ignorance of constitutional rights,[69] or the parent expressing consent was not the person in possession of the premises,[70] and therefore lacked the legal capacity to authorize a search.

In regard to the capacity of children to authorize a valid consent search of the parents' premises, an application of the general rule expressed above would preclude the existence of any such capacity except as to areas in which the child has been granted an exclusive right to privacy. Where the premises are not solely those of the parent but are in the possession of the parent and child jointly under an agreement to divide the right to possession, the rules concerning joint tenants and common occupants would apply.

Where other relatives are involved, the controlling question remains: Does the consenting party have the right to immediate possession of the premises to be searched? The answer will, of course, depend upon the arrangement between the pertinent parties. Relatives, like nonrelatives, may have the status of owner, landlord, tenant, joint tenant, common occupant, guest or visitor,

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States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); United States v. Rees, 193 F. Supp. 849 (D. Md. 1961).

67. State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577, 580 (1965) (search on consent of the father was upheld).

68. See discussion on "Owner" and "Tenant."

69. *E.g.*, United States v. Roberts, 179 F. Supp. 478 (D.C. Cir. 1959).

70. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

and the fact of their family relationship is immaterial to the validity of a waiver of constitutional rights.

G. *Agent*

The person having the right to possession may appoint another to act in the premises as his agent for a special purpose or for all purposes. The agent thereby may exercise a right to limited possession or full possession of the premises, according to the terms of his agency. His capacity to consent depends upon the extent to which he has been given the right to possession and authority to act for his principal, and, where such capacity exists, the agent's consent permits a search which is binding upon his principal as well as himself.[71]

The question as to whether the person being asked to give consent has the agency status and, if so, the extent of his authority "may often be a matter of grave dispute."[72] If such a person is only an employee, he lacks the general authority necessary to consent to a search valid against the employer.[73] But an employee who is also authorized to act in an agency capacity may be entitled to give consent. For example, where the president of a corporation consented to a search of corporate property for goods imported in violation of the customs laws, the search was upheld as lawful and his consent was binding upon the corporation.[74]

Officers seeking to obtain a valid consent to search business premises should always make the request of the highest ranking employee or business representative. In *United States v. Maryland Baking Co.*,[75] a baking plant manager, in charge of all of the plant operations, also acted in the capacity of representative of members of a partnership which owned the plant but took no part in the management of the business. The manager had never granted the foreman or superintendent authority to admit anyone to the plant. Under these circumstances a consent to search the plant premises furnished by the foreman was held invalid as to the partnership and as to the manager personally. The court indicated that as long as the manager was present on the premises, she was the person from whom consent should have been obtained.

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71. Raine v. United States, 299 F. 407 (9th Cir. 1924), *cert. denied*, 266 U.S. 611 (1924) (arrestee left farm under general control of one from whom valid consent was obtained). *See, also*, Reszutek v. United States, 147 F.2d 142 (2d Cir. 1945) (superintendent's voluntary consent to search cellar of apartment building valid against owner).

72. Reszutek v. United States, 147 F.2d 142 (2d Cir. 1945).

73. United States v. Ruffner, 51 F.2d 579 (D. Md. 1931) (consent obtained from a person found operating a still in a farm building held invalid against the owner because there was no proof that the consenting party was an agent rather than a mere employee on the premises).

74. *In re* 14 East Seventeenth Street, 65 F.2d 289 (2d Cir. 1933).

75. *See* United States v. Maryland Baking Co., 81 F. Supp. 560 (N.D. Ga. 1948).

In regard to searches of company business records, consent should be obtained from the person authorized to have sole control of the office and of the records,[76] or, from one who can act as an agent for the company.[77] Some evidence of an agent's apparent authority and right to possession of the premises may be found in the extent of his proprietary interest in his principal's business.[78]

H. *Employee-Employer*

A mere employee, having no agency relationship or other special authority, has no right to possession of the premises and therefore cannot authorize a search by consent.[79]

The employer's authority in the employment premises is much broader of course, but it is not unlimited. He may consent to a search of those parts of the premises which he occupies exclusively and of those parts to which he allows employees nonexclusive access.[80] But, where there are areas set aside for an employee's exclusive use, such as a particular section of an office desk, a locker or other receptacle of personal property, the employer may not consent.[81]

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76. United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946), *cert. denied*, 329 U.S. 742 (1946), *reh. denied*, 329 U.S. 826 (1946) (consent of the office manager sufficient).

77. Ansell v. United States, 352 U.S. 969 (1920) (corporate officers); United States v. H.J.K. Theatre Corp., 236 F.2d 502 (2d Cir. 1956), *cert. denied sub nom.*, Peel v. United States, 316 F.2d 907 (5th Cir. 1963), *cert. denied sub nom.*, Crane v. United States, 375 U.S. 896 (1963) (secretary-treasurer); United States v. Culber, 224 F. Supp. 419 (D. Md. 1963) (president).

78. Application of Fried, 68 F. Supp. 961 (S.D.N.Y. 1946), *aff'd*, 161 F.2d 453 (2d Cir. 1947), *cert. denied*, 331 U.S. 858 (1947) (consent obtained from the general manager entitled to 50 per cent of the profits).

79. For examples of such invalid consent searches see: Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966) (housekeeper consented to search of home); Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1936) (accountants having possession of taxpayer's business records for limited purposes did not have apparent authority to consent to search or seizure good against the owners); Ford v. Kelley, 223 F. Supp. 684 (D. Mass. 1963), *appeal dismissed*, 334 F.2d 942 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 961 (1964); United States v. Block, 202 F. Supp. 705 (S.D. N.Y. 1962) (handyman consented to search of basement of store); United States v. Guerrina, 112 F. Supp. 126 (E.D. Pa. 1953) (secretary could not consent to search of employer's files); United States v. Lagow, 66 F. Supp. 738 (S.D.N.Y. 1946), *aff'd*, 159 F.2d 245 (2d Cir. 1946), *cert. denied*, 331 U.S. 858 (1946), *reh. denied*, 332 U.S. 785 (1947) (clerk consented to removal of company business records).

80. State *ex rel.* Davis v. Algood, 256 F. Supp. 301 (E.D. La. 1966).

81. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (civilian employee's desk); Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966) (soldier's locked desk). *See also*, Villano v. United States, 310 F.2d 680 (10th Cir. 1962) (office desk).

I. *Custodian*

When the container or the other thing to be searched is now in the lawful custody of someone other than the owner, many courts hold that a valid search may be conducted on the consent of the custodian.

1. Custody by Agreement

An agreement, expressed or implied, to create a bailment or merely to make a loan controls the extent to the custodian's rights over the property. The owner may grant full control, in which case the custodian apparently has the capacity to consent to a search.[82] But when control is limited, for example, to mere custody for storage purposes with rights of access specifically denied, the custodian may not consent.[83]

2. Custody by Operation of Law

Where the law transfers custody from the owner to another, consent to search may be obtained from the one holding the property legally.[84]

3. Custody Without Agreement

Property hidden by a trespasser is subject to search by consent of the one in possession of the premises.[85] The trespasser is not entitled to the protection of the fourth amendment in premises he has invaded.[86]

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82. Sartain v. United States, 303 F.2d 859 (9th Cir. 1962), *cert. denied*, 371 U.S. 894 (1962) (consent by one given locked briefcase and key); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962) (friend consented to search of trunk of borrowed car). *See also*, Von Eichelberger v. United States, 252 F.2d 184 (9th Cir. 1958); United States v. Walker, 190 F.2d 481 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951), *reh. denied*, 342 U.S. 899 (1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); *In re* 14 East Seventeenth Street, 65 F.2d 289 (2d Cir. 1933).

83. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (package entrusted to airlines only for shipment). The *Corngold* case overruled Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *cert. denied*, 382 U.S. 1010 (1966), in which search by consent had been upheld where the custodian was given an unlocked briefcase and instructed not to deliver it to anyone else; Holzhey v. United States, 223 F.2d 823 (5th Cir. 955) (locked cabinet in storage on premises of another).

84. Elbel v. United States, 364 F.2d 127 (10th Cir. 1966) (search of books and records of bankrupt companies consented to by trustee); Springer v. United States, 340 F.2d 950 (8th Cir. 1965); United States v. Culver, 224 F. Supp. 419 (D. Md. 1963) (consent by receiver); United States v. Cowan, 37 F.R.D. 215 (1963) (baggage left in hotel room retained under a statutory lien for unpaid room rent subject to search by consent of management).

85. Cutting v. United States, 169 F.2d 951 (9th Cir. 1948) (property stolen by *A* found in building on *B*'s premises during search by consent of *B*).

86. Jones v. United States, 362 U.S. 257, 267 (1960). *See also*, Fisher

4. Custody of Abandoned Property

Consent may be obtained from one who has recovered abandoned property.[87]

J. *Host and Guest or Visitor*

A guest or visitor, lawfully present, has a constitutional right to object to an unreasonable search of the premises when the fruits of the search are to be used against him.[88] But this does not answer the question commonly posed in such cases: whether a voluntary consent to search, given by the host in possession of the premises, is effective against the guest or visitor.

The generally recognized rule declares that the host's waiver of the constitutional protection afforded his premises is effective against a guest or visitor. For example, a woman who was the tenant in possession of an apartment, consisting of two bedrooms, living room, kitchen, bath, and porch, gave the officers consent to search the apartment. In the bathroom the officers found evidence against the defendant, who, for several days past, had been, and still was, a guest of the tenant in that apartment. The search was held reasonable.[89]

The statement of the general rule assumes a guest or visitor whose presence is casual only—a stay of a few days or a week or so at most. The question becomes more difficult in those cases in which the "guest" or "visitor" stays for a longer and indefinite term, as when an aging or impoverished relative or friend is allowed to live on the premises more or less permanently but without paying rent. It has been held that a guest of this type has the same possessory right in the room and furnishings given over

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v. United States, 324 F.2d 775 (8th Cir. 1963), *cert denied*, 377 U.S. 999 (1964), *reh. denied*, 379 U.S. 873 (1964); United States v. Rees, 193 F. Supp. 849 (D. Md. 1961).

87. Feguer v. United States, 302 F.2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962) (abandoned in rented room); Abel v. United States, 362 U.S. 217 (1960) (property abandoned in hotel room by former tenant); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963) (abandoned in room in private home).

88. Jones v. United States, 362 U.S. 257 (1960); United States *ex rel.* Eastman v. Fay, 225 F. Supp. 677 (S.D.N.Y. 1963) *rev'd on other grounds*, 333 F.2d 28 (2d Cir. 1964), *cert. denied*, 381 U.S. 954 (1965).

89. Burge v. United States, 342 F.2d 408 (9th Cir. 1965), *cert. denied*, 382 U.S. 829 (1965). *See also*, Teasley v. United States, 292 F.2d 460 (9th Cir. 1961) (as to entry only); Fredrickson v. United States, 266 F.2d 463 (D.C. Cir. 1959); Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958), *cert. denied*, 357 U.S. 930 (1958); Calhoun v. United States, 172 F.2d 457 (5th Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); Milyonico v. United States, 53 F.2d 937 (7th Cir. 1931), *cert. denied*, 286 U.S. 551 (1931).

to his use that a tenant has in a rented room.[90] Other decisions, however, disagree, appearing to hold that one who lives there by permission only acquires no right of possession in the premises, with the result that the possessor's consent to search is as effective against the permanent guest or visitor as against the temporary one.[91]

In the case of either a casual or permanent guest or visitor, it would seem that the consent of the party possessing the premises would be effective against the guest only as to the premises themselves, including the room occupied by the guest, but it would not authorize the officers to search the personal property of the guest without his consent. It was so held in *Holzhey v. United States*.[92] Such a rule is consistent with the decisions cited under "Partner" and "Husband and Wife," in which it was held that the consent of one spouse or partner to a search of the premises jointly possessed does not extend to the property and things which the other spouse or partner has an exclusive right to possess. But in *Woodard v. United States*,[93] the officers searched the room occupied by two guests and in a *coat* they found a gun, of which the host previously had advised them, and in a *box* of clothing which the host had given to the guests, they found certain papers. The court upheld the search, mentioning the host-guest relationship and stating that exceptional circumstances (dangerous instrumentalities) justified the search.

When the guest or visitor abandons the premises and leaves personal property therein, he loses all rights as to both and they may be searched on the consent of the host in possession.[94]

Citation of authority hardly seems necessary to prove that the consent of the guest to search the house or apartment in which he is temporarily located is not effective against the host. A guest acquires no possessory right in the premises generally which would supersede the right of his host. But a court holding that a permanent guest acquires the possessory right to his room, as in *Reeves v. Warden*,[95] could logically hold that the guest's consent to

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90. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965). *See also*, Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955).

91. United States *ex rel.* McKenna v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964), *aff'd*, 342 F.2d 998 (3d Cir. 1965), *cert. denied*, 382 U.S. 857 (1965); Maxwell v. Stephens, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965), *reh. denied*, 382 U.S. 1000 (1965); State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965).

92. Holzhey v. United States, 223 F.2d 915 (4th Cir. 1965).

93. Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958), *cert. denied*, 357 U.S. 930 (1958).

94. Abel v. United States, 362 U.S. 217 (1960) (hotel room); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963) (private home). *See also*, Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965) (private home); Feguer v. United States, 302 F.2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962) (rented room).

95. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

a search of that room would be effective against the host.

In some of the guest cases cited, the guest is the adult child of the host. See the discussion under "Parent and Child."

CONSENT: WAIVER OF CONSTITUTIONAL RIGHTS

A. *Advice of Fourth Amendment Rights*

An expression of consent is no authority for a lawful search without a warrant unless it is a waiver of constitutional rights. Therefore, the consenter must be aware of the protections of the fourth amendment and his consent must be given with the intention of waiving those rights.[96] As expressed by one court: "The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd."[97]

To insure that these standards are met, some courts would require that the individual be clearly advised of that which he is being requested to waive.[98] Others, including the highest courts of two states, Nebraska in *State v. Forney*,[99] and Kansas in *State v. McCarty*,[100] have indicated that warning of fourth amendment rights will not be considered an essential prerequisite for a valid consent until the Supreme Court of the United States expressly declares such a rule. The United States Court of Military Appeals has adopted the position that such advice is unnecessary to justify a search by voluntary consent.[101] This court, however, would require a prior warning where, in addition to consent, the subject is requested to point out his locker or identify particular items of property as his.[102] Since the act of identification could be considered an incriminating statement, an advice of rights in those instances appears more appropriate, but this issue is beyond the fourth amendment problem involved in routine consent cases.

Though there is clear disagreement as to the present legal necessity for an advice of rights, the law unquestionably requires the prosecution to bear the burden of proof that any consent claimed was given with knowledge.[103]

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96. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Wren v. United States, 352 F.2d 617 (10th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966).
97. United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966).
98. *Id.*; United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966).
99. State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967).
100. State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967).
101. United States v. Insani, 10 U.S.C.M.A. 519 (1959).
102. A.C.M.S.-22319, Guggenheim, 37 C.M.R. 936 (Air Force Bd. Rev. 1967).
103. United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

Thus, until the Supreme Court settles this issue, the safer legal course to insure the receipt of a competent and intentional waiver is to give such advice. The statement should be limited to a brief declaration of the fourth amendment protection against unreasonable search and seizure. It should do no more than to indicate the individual has a constitutional right not to have a search made of his premises without a search warrant and that he has a right to refuse to consent to such a search.

B. *Express Waiver*

As indicated by *Miranda v. Arizona*,[104] the waiver of a constitutional right is not to be lightly inferred. The prosecution must prove an express waiver of fifth and sixth amendment rights before it may introduce evidence obtained under circumstances that otherwise would be violative of these amendments. No decision of the Court has extended this requirement to fourth amendment cases; however, the government does have to show that the consent expressed the person's intention of waiving those constitutional rights,[105] and that it was voluntarily given.[106] It must be positive and cannot be implied from the mere failure to protest entry and search.[107]

Though it is not mandatory, the most convincing evidence of waiver is a signed and witnessed writing bearing a declaration that the advice of rights was given, that it was understood, and that the consent to search was intended as a waiver of fourth amendment protections. Such proof is not absolute, however, and it must be supplemented by testimony of the officers as to the circumstances under which the document was executed.

Voluntary Consent

A. *In General*

The most difficult question for the courts to decide in consent search cases is whether the consent was truly voluntary. Their views differ considerably. Some tend to doubt that any consent given is genuinely voluntary unless accompanied by some specific and unequivocal act of the accused indicating that he did intend to consent, such as a contemporaneous confession or admission of guilt. What is perhaps the strongest statement of this position is

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104. Miranda v. Arizona, 384 U.S. 436 (1966).

105. Johnson v. Zerbst, 304 U.S. 458 (1938); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965); United States v. Fowler, 136 F. Supp. 926 (E.D. Tenn. 1954).

106. Amos v. United States, 255 U.S. 313 (1921).

107. Canida v. United States, 250 F.2d 822 (5th Cir. 1958). *See also,* Johnson v. United States, 333 U.S. 10 (1948); Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959); Commonwealth *ex rel.* Whiting v. Cavell, 244 F. Supp. 560 (M.D. Pa. 1965), *aff'd*, 358 F.2d 132 (3d Cir. 1966), *cert. denied*, 384 U.S. 1004 (1966).

found in *Higgins v. United States*,[108] where the court expressed the opinion that ". . . no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."

A possible flaw in the *Higgins* reasoning, apparent in at least those cases in which the object sought ". . . could easily have been concealed . . . ."[109] is its failure to recognize the fact, known to all experienced officers, that the criminal often is both quite clever and quite confident that he can outwit the police. The proof is in his selection of places in which to hide small items of loot, evidence and contraband, such as the following: a trash can,[110] a washing machine,[111] between the back and the springs of an upholstered chair,[112] in a towel rack on the back porch,[113] in a carpet sweeper,[114] under the carpeting of a stairway,[115] in a hollow pencil or block of wood,[116] and in a bird's nest in an awning just outside the apartment window.[117] In light of facts such as these, it seems beyond question that many a suspect who consented to a search of his premises has watched the officers walk out without finding the objects which he had hidden.

The *Higgins* dictum suffers, also, from the fact that some who consent, and who appear to be quite sane enough to stand trial, actually assist the officers in the search.[118] At any rate, the dictum has been both specifically and impliedly rejected by other courts.[119] Some decisions have suggested reasons supporting a voluntary consent by one who denies—or at least does not admit—his guilt. He may give consent as a device to shift the culpability elsewhere,[120] or in the belief that anything found would be of no significance.[121]

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108. Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954).
109. Harris v. United States, 331 U.S. 145, 152 (1947).
110. Williams v. United States, 273 F.2d 781 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960).
111. Warden v. Hayden, 387 U.S. 294 (1967); Barrientes v. United States, 235 F.2d 116 (5th Cir. 1956), *cert. denied*, 352 U.S. 879 (1956).
112. United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958), *cert. denied*, 360 U.S. 912 (1959).
113. Hamer v. United States, 259 F.2d 274 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959), *reh. denied*, 359 U.S. 962 (1959).
114. United States v. Davis, 281 F.2d 93 (7th Cir. 1960), *rev'd on other grounds*, 364 U.S. 505 (1960).
115. Williams v. United States, 260 F.2d 125 (8th Cir. 1958), *cert. denied*, 359 U.S. 918 (1959).
116. Abel v. United States, 362 U.S. 217 (1960).
117. Jones v. United States, 362 U.S. 257 (1960).
118. *See* United States v. MacLeod, 207 F.2d 853 (7th Cir. 1953); United States v. Kubik, 266 F. Supp. 501 (S.D. Iowa 1967).
119. *See* United States v. Martin, 176 F. Supp. 262 (S.D.N.Y. 1959).
120. United States v. DeVivo, 190 F. Supp. 483 (E.D.N.Y. 1961).
121. Gorman v. United States, 380 F.2d 158 (5th Cir. 1967).

Consent may be a deliberate stratagem calculated to dispel the suspicions of the officers, taken in the belief that the goods are too well hidden to be found.[122] Or, consent may be a stratagem deliberately used for some other purpose.[123]

B. *No Duress*

The burden of proof required of the prosecution includes the necessity for clear and convincing evidence that consent was voluntarily given in circumstances free of duress.[124] The officer, though acting in good faith, must be careful to avoid not only the use but also the appearance of coercion.[125] It is imperative that he consider carefully each of the factors that may be influential in determining the legal effectiveness of the consent obtained.

Some of these factors are:

1. Appropriate Time

At the outset, officers must, if possible, select an appropriate hour to request consent. Timing is important to avoid even the semblance of duress. In the usual residential situation the most acceptable time is during the daylight hours.[126] The courts have criticized, as coercive, requests for consent made in the home after dark.[127] However, where the urgency of the case demands it, consent may be requested at any time. In regard to business premises, used at night, a request for consent may be appropriate during the actual business hours observed.

2. Number of Officers

The size of the group requesting consent should be the minimum consistent with the safety of the officers. Evidence that they appeared in such numbers as to constitute overwhelming force tends to destroy the voluntariness of consent. For example, in a narcotics case, a group of eleven officers approached a private home. Five entered the premises and requested consent to search

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122. United States v. Dornblut, 261 F.2d 274 (2d Cir. 1958); Grice v. United States, 146 F.2d 849 (4th Cir. 1945); United States v. Adelman, 107 F.2d 497 (2d Cir. 1939); Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926), *cert. denied*, 273 U.S. 768 (1926); United States v. Martin, 176 F. Supp. 262 (S.D.N.Y. 1959).

123. *See* United States v. Burgos, 269 F.2d 763 (2d Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).

124. United States v. Fowler, 17 F.R.D. 499 (1955).

125. Amos v. United States, 255 U.S. 313 (1921).

126. United States v. Horton, 328 F.2d 132, 135 (3d Cir. 1964), *cert. denied sub nom.*, Edgar v. United States, 377 U.S. 970 (1964).

127. Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953) (after midnight); United States v. Brennen, 251 F. Supp. 99 (N.D. Ohio 1966) (after 5 A.M.); United States v. Rutheiser, 203 F. Supp. 891 (S.D.N.Y. 1962) (8:30 P.M. - 9:15 P.M.); United States v. Roberts, 179 F. Supp. 478 (D.D.C. 1959) (close to midnight).

while the remainder surrounded the house. The court held there was no voluntary consent to search given, basing the decision in part on the coercive effect of the presence of such a group in and about the defendant's home.[128]

3. Display of Weapons or Other Symbols of Authority

Officers seeking permission to search should avoid unnecessary display of weapons, and should make their requests clearly independent of the power and authority represented by the badge and uniform. This does not prevent officers in full uniform from requesting consent.[129] It merely emphasizes the importance of obtaining a waiver of constitutional rights through a request rather than through mere submission to the symbols of authority.[130]

4. Approach to the Premises

Where the sole reason for approaching the premises is to solicit a voluntary consent to search, officers should avoid unnecessary appearance of force. The siren, the flashing red light, numbers of officers or cars, all valid symbols of authority, are inappropriate where the end to be gained must come voluntarily.

5. Announcement of Presence, Identity, Purpose

To preserve the balance between the privacy of the premises and the authority to inquire, the officer should make known his presence at the doorway, identify himself, declare his purpose and request permission to enter. Without a favorable response, the officer has no authority to proceed into the premises, but where permission is granted he may enter.

Permission to enter is not permission to search. Whether obtained at the door prior to entry or obtained during interview following entry, consent to search must be independently requested and specifically given.

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128. Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953).

129. United States v. Thompson, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966); United States v. Thomas, 250 F. Supp. 771, 787, n.25 (S.D.N.Y. 1966).

130. Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921); Gatlin v. United States, 326 F.2d 666 (Dist. of Col. 1963); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); United States v. Marquette, 271 F. 120 (N.D. Cal. 1920); United States v. Brennan, 251 F. Supp. 99 (N.D. Ohio 1966); Lankford v. Schmidt, 240 F. Supp. 550 (Md. 1965).

6. Language of the Request for Consent

The exact words chosen by the officer and their expression are important in obtaining truly voluntary consent. The language must convey a request, not a command. It serves the officer's purpose best when it is complete but simple and direct, avoiding intimidation by volume, inflection or ambiguous meaning.[131]

7. Status or Condition of the One From Whom Consent is Obtained

Law enforcement officers should remember that the courts will be particularly alert to detect any evidence of duress in the case of women, the very young, the very old, the foreign born and all others for whom special consideration has been shown in the past.[132]

But, officers should not hesitate to make a bona fide request for consent to search in such special cases. In *Roberts v. United States*,[133] a police lieutenant and the chief, investigating a homicide case, were dressed in plain clothes and used an unmarked car when they visited the defendant's home and obtained his wife's voluntary consent to search. In upholding the validity of the consent search, the court commended the officers for the reasonable manner in which they negotiated with the wife.

8. Custody

Where the person giving consent is in custody, the burden of proving voluntariness becomes more formidable but not impossible. It is here that the widest divergence of opinion appears among various courts.[134] However, there appears to be general agreement that arrest and custody are merely factors to be considered, among others, in determining the voluntariness of consent. Of greater importance are the particular circumstances under which the arrestee expressed his waiver.[135] Even the fact that the arrest was

131. United States v. Brennan, 251 F. Supp. 99 (N.D. Ohio 1966).

132. Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1965); Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955); Kovach v. United States, 53 F.2d 639 (6th Cir. 1931); United States v. Wai Lau, 215 F. Supp. 684 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 310 (2d Cir. 1964), *cert. denied*, 379 U.S. 856 (1964); United States v. Ong Goon Sing, 149 F. Supp. 267 (S.D.N.Y. 1957).

133. Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965).

134. *Compare* United States v. Pate, 222 F. Supp. 998 (N.D. Ill. 1963), *aff'd*, 332 F.2d 531 (7th Cir. 1963), *with* Tatum v. United States, 321 F.2d 219 (9th Cir. 1963).

135. United States v. Mitchell, 322 U.S. 65 (1944); United States v. Hall, 348 F.2d 837 (2d Cir. 1965), *cert. denied*, 382 U.S. 947 (1965); United States v. Bracer, 342 F.2d 522 (2d Cir. 1965), *cert. denied*, 382 U.S. 954 (1965); Weed v. United States, 340 F.2d 827 (10th Cir. 1965); Tatum v. United States, 321 F.2d 531 (7th Cir. 1963); United States v. Page, 302 F.2d 81

illegal is not necessarily fatal where the case presents a clear indication the express consent given was truly voluntary.[136]

C. *No Fraud*

Consent to search obtained by fraud is void and evidence acquired as a result of such "consent" is subject to the exclusionary rule as the product of an unreasonable search and seizure. Valid consent cannot be obtained by advising falsely that a search warrant is available "anyway,"[137] by falsely implying that a threat of arrest will be lifted as soon as consent is given,[138] by declaring that the officer's purpose is to interview when his real purpose is to search[139] or by "conning."[140]

However, as long as there is no fraud or misrepresentation by the officer and his identity and purpose are known to the person having the capacity to consent, there is no duty to explain fully all the possible legal consequences of consent and cooperation.[141] Similarly, some courts have held it is unnecessary for the officer to declare all the items he hopes to locate in the premises as long as he intends, in good faith, to search for the property he *does* specify in his request for consent. For example, a consent search was valid where the officers were given permission to search for item *A* but unknown to the person giving consent, they intended to search for items *A and B*.[142] Presumably, the authority given to search for item *A* would limit the officers to looking in those places where *A* could reasonably be located and should they discover *B* in the course of that search they would not have to close their eyes to it. If it is the known fruit, instrumentality or other evidence of a crime or per se contraband and therefore subject to seizure, it may be taken. If not, specific consent will be required to remove it. There would be no authority for an independent search for item *B*

(9th Cir. 1962); Armwood v. Pepersack, 244 F. Supp. 469 (D. Md. 1965), *aff'd*, 359 F.2d 854 (4th Cir. 1966).

136. Burke v. United States, 328 F.2d 399 (1st Cir. 1964), *cert. denied*, 379 U.S. 849 (1964), *reh. denied*, 380 U.S. 927 (1965).

137. Bolger v. United States, 189 F. Supp. 237 (S.D.N.Y. 1960), *aff'd*, 293 F.2d 368 (2d Cir. 1961), *rev'd on other grounds*, 371 U.S. 392 (1962).

138. United States v. Como, 340 F.2d 891 (2d Cir. 1965).

139. Pekar v. United States, 315 F.2d 319 (5th Cir. 1963).

140. United States v. Wallace, 160 F. Supp. 859 (D.C. Cir. 1958). *See also*, United States v. Ong Goon Sing, 149 F. Supp. 267 (S.D.N.Y. 1957).

141. Burnham v. United States, 297 F.2d 523 (1st Cir. 1961); Badger Meter Manufacturing Co. v. Brennan, 216 F. Supp. 426 (E.D. Wis. 1962), *cert. denied*, 373 U.S. 902 (1963).

142. United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958), *cert. denied*, 360 U.S. 912 (1959).

either in places where *A* could not be located or after *A* had been found.

Pretexts or other misrepresentations may be used for the limited purpose of "getting the door open," but the officer must present a bona fide request, including full disclosure of identity and purpose, and obtain voluntary consent before commencing a search.[143] Where no search is intended and the objective is merely to gain entry to talk with the occupant, the use of such investigative techniques has been judicially approved.[144]

Specific Consent

A. *Consent to Entry*

Officers should carefully observe the distinction between an invitation to enter and a consent to search the premises. Consent to entry alone will not justify a search,[145] but it can be a very useful investigative tool, permitting a better atmosphere for the interview and at least exposing the interior of the premises to the casual scrutiny of the officer.[146] Less formality is required to obtain permission to enter. "A policeman who identifies himself and his purpose from the other side of a closed door has every reason to assume that the act of unlocking and opening the door, without more, is a consent to talk, and that the walking back into the room is an implied invitation to conduct the talking inside.[147] Such permission generally may be granted by any occupant lawfully on the premises; for example, judicial approval has been given where the invitation to enter was extended by the defendant in his own premises,[148] by his mother-in-law,[149] by his child, 8 years of age,[150] and by a joint tenant.[151] But where consent to entry is colored by duress, it is unlawful.[152]

When lawful entry has been made into the premises, the officer may observe whatever is in open view or what becomes

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143. United States v. Horton, 328 F.2d 132 (3d Cir. 1964), *cert. denied sub nom.*, Edgar v. United States, 377 U.S. 970 (1964); United States v. General Pharmacal Co., 205 F. Supp. 692 (D.N.J. 1962); United States v. Martin, 176 F. Supp. 262 (S.D.N.Y. 1959).

144. Lewis v. United States, 385 U.S. 206 (1966), *reh. denied*, 386 U.S. 939 (1967) (informant posed as narcotics purchaser); United States v. Locklear, 237 F. Supp. 895 (N.D. Cal. 1965) (officers posed as potential purchasers of stolen property).

145. Commonwealth v. Painter, 368 F.2d 142 (1st Cir. 1966); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied*, 383 U.S. 968 (1966); Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959).

146. United States v. Horton, 328 F.2d 132 (3d Cir. 1964), *cert. denied sub nom.*, Edgar v. United States, 377 U.S. 970 (1964).

147. Robbins v. MacKenzie, 364 F.2d 45, 48 (1st Cir. 1966).

148. United States v. Cachoian, 364 F.2d 291 (2d Cir. 1966).

149. United States v. Francolino, 367 F.2d 1013 (2d Cir. 1966).

150. Davis v. United States, 327 F.2d 301 (9th Cir. 1964).

151. Teasley v. United States, 292 F.2d 460 (9th Cir. 1961).

152. Pekar v. United States, 315 F.2d 319 (5th Cir. 1963).

apparent to him during the course of the interview because consent to enter constitutes implied consent to observe that which is in plain view.[153] His observations do not constitute a search and any facts thus uncovered will be useful in building probable cause.[154] Similarly, the known fruits, instrumentalities, contraband and other evidence of a crime discovered in this manner may be seized and, because there was no search, a search warrant is unnecessary to authorize the seizure.[155]

B. *Unequivocal Expression of Consent*

Voluntary consent to search must be clearly expressed. Plain language will suffice in most instances, but it is not enough for officers to "reasonably and in good faith" believe effective consent has been given. The crucial question is whether the proper party *in fact* voluntarily consented to the search.[156] Therefore, it is essential for the language of consent to be as free of ambiguity as possible.

Such statements as "come on in,"[157] and "you are welcome to go search the whole place,"[158] shorn of their context, do not convey a clear intention to permit a search without a search warrant. In the first instance, the invitation may well be limited to mere entry for purposes other than search and, in the second, there is no indication the speaker meant to permit an unwarranted search.

The language used ordinarily must be considered in light of the facts of the situation for, as stated by the United States Court of Appeals for the Ninth Circuit in *Cipres v. United States*:[159]

> [A] waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may

153. Chapman v. United States, 346 F.2d 383 (9th Cir. 1965), *cert. denied*, 382 U.S. 909 (1965).
154. United States v. Horton, 328 F.2d 132 (3d Cir. 1964), *cert. denied sub nom.*, Edgar v. United States, 377 U.S. 970 (1964).
155. Robbins v. MacKenzie, 364 F.2d 45 (1st Cir. 1966); Davis v. United States, 327 F.2d 301 (9th Cir. 1964); Ellison v. United States, 206 F.2d 476 (D.C. Cir. 1953).
156. Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1956), *cert. denied*, 383 U.S. 968 (1966); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965).
157. United States v. Evans, 194 F. Supp. 90 (D.C. Cir. 1961).
158. Channel v. United States, 285 F.2d 217 (9th Cir. 1960).
159. Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965).

be freely and effectively withheld.[160]

Some facts to which the officer might testify in support of a search by consent are:

The defendant himself first suggested the search;[161] the defendant signed a written consent-to-search form after being advised of his fourth amendment rights;[162] no printed form was available but voluntary consent was recorded in writing;[163] the arrestee declined to sign a written waiver but he explained, "You don't need that, you got my permission;"[164] the defendant cooperated by furnishing the key to unlock his house,[165] his apartment,[166] his car,[167] or his personal effects;[168] the defendant specified the amount of money or described goods that would be found and pinpointed their location;[169] the defendant set the conditions under which the search would be conducted by saying, ". . . I will only take two of you;"[170] or the defendant himself located the property and made it available to the officers.[171]

C. *Limitations*

Voluntary consent to search, being an expression of an individual's decision to waive his constitutional rights, is not necessarily a total surrender to the will of the officer. Such limitations as the person giving consent chooses to apply must be recognized. For example, there may be specific restrictions as to who may conduct the search;[172] how many men may assist; when the search may begin and how long it may continue; the area of search;[173] and the stated objective of the search.[174]

From the officer's point of view, his request for consent should be broad enough to insure a thorough search while at the same time

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160. *Id.* at 97.
161. United States v. Simpson, 353 F.2d 530 (2d Cir. 1965), *cert. denied,* 383 U.S. 971 (1966).
162. United States v. Plata, 361 F.2d 958 (7th Cir. 1966); Ruud v. United States, 347 F.2d 321 (9th Cir. 1965), *cert. denied,* 382 U.S. 1014 (1965).
163. United States v. Hecht, 259 F. Supp. 581 (W.D. Pa. 1966).
164. Burge v. United States, 342 F.2d 408, 411 (9th Cir. 1965).
165. King v. Pinto, 256 F. Supp. 522 (D.N.J. 1966).
166. United States v. Rivera, 321 F.2d 704 (2d Cir. 1963).
167. Robinson v. United States, 325 F.2d 880 (5th Cir. 1964).
168. United States v. Smith, 308 F.2d 657 (2d Cir. 1962), *cert. denied,* 372 U.S. 906 (1963).
169. United States v. Torres, 354 F.2d 633 (7th Cir. 1966); Rice v. Warden, 237 F. Supp. 463 (D. Md. 1964).
170. United States v. Smith, 308 F.2d 657, 660 (2d Cir. 1962), *cert. denied,* 372 U.S. 906 (1963).
171. United States v. Hall, 348 F.2d 837 (2d Cir. 1965), *cert. denied,* 382 U.S. 947 (1965); Grillo v. United States, 336 F.2d 211 (1st Cir. 1964), *cert. denied sub nom.,* Gorin v. United States, 379 U.S. 971 (1965).
172. Weed v. United States, 340 F.2d 827, 829 (10th Cir. 1965).
173. United States v. Royster, 204 F. Supp. 760 (N.D. Ohio 1961).
174. United States v. Guerrina, 112 F. Supp. 126 (E.D. Pa. 1953).

it must be specific enough to clearly indicate who is going to conduct what kind of a search, where, and for what purpose. If the officer wants to search only the room currently being occupied by his subject, the consent obtained should specify that room. But if he wants to search additional premises they must be identified also. A clear understanding as to what is being requested and what rights are being waived in response to that request will avoid much difficulty in determining the legality of a search by consent.[175]

D. *Revocation or Modification*

Consent to search given voluntarily may be preseumed to continue, unless revoked, until all areas to be searched have been examined. This is true even where the searching officers cannot complete the search and must return the following day to accomplish the task. However, once completed, a second search should not be begun without further authority, such as new consent, search warrant, or arrest on the premises.[176]

A voluntary consent to search having been given without obligation or consideration may be revoked if the intention to revoke is expressed at any time prior to the completion of the search.[177] That part of the search which occurs prior to the revocation of consent is an authorized search at the time it is executed and, therefore, it is lawful. Evidence obtained thereby may be admissible and should be retained. But that portion of the search which occurs following the revocation of consent is executed without authority and is therefore unlawful by definition. Logically, the revocation of consent would appear to be merely a denial of a further right to search. It cannot invalidate the authority

175. For some illustrative cases see: United States v. Smith, 308 F.2d 657 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963) (consent pertained only to a specific suitcase stored on protected premises); Karwicki v. United States, 55 F.2d 225 (4th Cir. 1932) (consent to search business premises did not include consent to search residence located in rear portion of building); Strong v. United States, 46 F.2d 257 (1st Cir. 1931) (consent to search a barn did not extend to a root cellar nearby); United States v. Hopps, 215 F. Supp. 734 (D. Md. 1962), *aff'd*, 331 F.2d 332 (4th Cir. 1963), *cert. denied*, 379 U.S. 820 (1964) (consent to search file drawers for company business papers did not authorize seizure of personal papers misfiled in the drawers, or the search and seizure of other papers not belonging to the company but found on top of desks and file cabinets other than those marked with the company name).

176. *See* Care v. United States, 231 F.2d 22 (10th Cir. 1956), *cert. denied*, 351 U.S. 932 (1956).

177. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965). *See also*, United States v. Bracer, 342 F.2d 522 (2d Cir. 1965), *cert. denied*, 382 U.S. 954 (1965).

previously given but it can terminate that authority.

The authority to search also may be expanded by consent. For example, where one in lawful possession gives consent for officers to search additional separate premises not named in the search warrant, such consent authorizes an expansion of the area of lawful search.[178] Similarly, a voluntary consent to search particular premises may be expanded by an expression of consent to search a greater area and officers are entitled to search according to the maximum extent intended.

Conclusion

In light of the swift currents of change running through the criminal law today, it is imperative that basic investigative techniques, such as the search by consent, be closely reexamined and evaluated according to contemporary standards. There may be a need for modification of the manner in which investigations are conducted. If so, such change as is required by developing case law and by legislation may be incorporated in training programs for new officers and in amended instructions to veterans. But, even where present investigative techniques are found to be fully consistent with the law, there may well be room for improvement. It would not be a unique experience for officers to find that there are more lawful investigative alternatives available to them than they are now utilizing.

As this study indicates, there are several important limitations on the authority to conduct a search by consent, but it remains a significant factor in the evidence-gathering process. The principle that a man may waive a right guaranteed him under the Constitution has not been abrogated. The refinements in this area of the law have come about chiefly due to concern as to the applicability of the principle in circumstances where the nature of the waiver is in doubt or where competency is an issue. There is no indication that the complexity of proving the authority to search by consent will diminish as the body of search and seizure law continues to grow. Therefore, the utility of this technique will be limited largely to those officers who understand its limitations and prerequisites and who call upon it with discretion.

178. Huhman v. United States, 42 F.2d 733 (8th Cir. 1930); Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926), *cert. denied*, 273 U.S. 768 (1926).

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